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NO. 82-2015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MEMORANDUM IN REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Government is forced to concede it had notice of the Proposed Settlement Agreement as of April 28, 1982, since it was served on the Government for its review, consent or objection. However, the Government has never admitted it also had notice of the Protective Order and the Sealing provisions. The Government has always relied, as it continues to rely on page 3, in a footnote, of their Memorandum, that the record is insufficient to establish that fact. The Government refuses, and continues to refuse, to supply information as to whether it had notice, or did not have notice of the sealing provisions. It has not done so before the Bankruptcy Court, the District Court, the Second Circuit, and, now, before this Court. It is submitted the Government has avoided this issue because there is sufficient evidence to show it was aware of the Protective Order when it consented to the Rule 7-B designation of Davis as set forth in more detail at pages 3 and 4 of the Petition filed by Davis with this Court. As noted, Assistant United States Attorney Carey in his letter of September 5, 1980, requested the Bankruptcy Court to place severe sanctions on the use of access, by the United States, of both the testimony of Davis, and the documents used during the testimony under the Rule 205 designation. The reason for this action is clear, in that the Government did not want to immunize Davis by gaining access to

his testimony, or the documents used. The Government was aware of the sealing provisions as early as September 5, 1980, and, again, on April 28, 1982, when the Settlement Agreement was submitted to the Government. The Settlement Agreement incorporated those same sealing provisions which Assistant United States Attorney Carey demanded for the Government's protection.

It is the Solicitor General's position, as well as that of the Second Circuit that only affirmative misconduct by governmental employees can estop the Government. Nowhere in the Solicitor's memorandum is there any reference to Santiago v. Immigration and Naturalization Service, 526 F.2d 488 (9th Cir. 1975) which stands for the principle that estoppel can arise where a government employee fails to inform or inquire. Nor is there any reference to the dissenting opinion in Schweiker v. Hansen, 450 U.S. (1981) indicating it is time for this Court to define affirmative misconduct. When these opinions are considered, together with the recognition by the Second Circuit that there is a conflict with that of the Ninth Circuit as to what action by a government employee will constitute estoppel, Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1978), it is time to consider this issue.

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